U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

August 22, 1994

Arturo G. Michel, Esq.
Bracewell & Patterson
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711 Louisiana Street
Suite 2900
Houston, Texas 77002-2781

Dear Mr. Michel:

This refers to the change in the method of electing school trustees from seven at large to five from single-member districts and two at large, the districting plan, the implementation schedule and a polling place change for the Edna Independent School District in Jackson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our May 2, 1994 request for additional information on July 6, 1994; supplemental information was received on August 12, 1994.

The Attorney General does not interpose any objection to the polling place change. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

With regard to the method of election change, we have carefully considered the information that you have provided, as well as information provided by other interested persons. According to the 1990 Census, the Edna Independent School District has a total population of 7,531 persons, of whom 22 percent are Hispanic and 13 percent are black. Hispanic and black persons constitute, respectively 19.2 and 12.8 percent of the voting age population in the school district. Currently, the school board consists of seven members elected at large by plurality vote to three year, staggered terms. There is one Hispanic member of the school board and one black member of the school board. They were elected May 7, 1994, using the unprecleared method of election. Prior to this election, no minorities ever have served on the school board.

The school board began its consideration of changing its at-large method of election after the minority community raised concerns that the continued use of at-large elections for school board trustees unnecessarily limited the opportunity for minority voters to elect their candidates of choice to the school board. After minority leaders expressed their concern, the school district appointed a tri-racial committee to consider alternative methods of election.

Among the plans considered by the tri-racial committee were plans with seven single-member districts (7-0 plan), six single-member districts and one at-large seat (6-1 plan), five single-member districts and two super districts (5-2 super) and five single-member districts and two at-large seats (5-2 plan). The fourteen member tri-racial committee voted nine to five in favor of the 7-0 plan. The 7-0 alternative provided for one district with a black majority voting age population (64.7 percent) and one district with an Hispanic majority voting age population (52.7 percent). The school board, however, rejected the recommendation by the tri-racial committee and adopted the 5-2 method of election instead. The 5-2 plan provides for one district with a black majority voting age population (52.3 percent) and a district with an Hispanic voting age population of 46.0 percent.

We have reviewed the board's contention that minority voters will be able to elect their candidates of choice in the two districts in which they constitute a majority of the voting age population. The board has not provided sufficient election data to suggest that election contests for school board are not characterized by a pattern of racially polarized voting or that minority voters are cohesive. The board concedes that the three elections upon which it relies to support its contention that the minority majority districts provide minority voters with an "equal chance" to elect candidates of choice are insufficient to predict future minority electoral success. Our analysis of school board election contests shows an apparent pattern of racially polarized voting and mixed results with regard to cohesion among black and Hispanic voters. Under these circumstances, the method of election adopted by the school board appears to afford minority voters an unnecessarily limited opportunity to elect candidates of their choice.

We also have considered the school district's proffered reasons for selecting the 5-2 method of election, including a desire to provide minority voters with an "equal opportunity" to elect candidates of choice but not a guarantee. While there is no requirement to guarantee minority voters can elect candidates of choice, there is a requirement to provide minority voters with a reasonable opportunity to do so. The board defined a district

that provides an "equal opportunity" as one that has 50 percent or more minority population. However, in applying this criterion, the board appears to have chosen the method of election that provides for majority minority districts in which the dominant minority group is as near to 50 percent as possible. No consideration appears to have been given to the apparent pattern of racially polarized voting or inconsistent cohesion between black and Hispanic voters. Based on our investigation, it does not appear that districts, in which the dominant minority group is as near to 50 percent as possible, provide minority voters with a reasonable opportunity to elect candidates of choice.

Finally, it is apparent that the protection of the interests of incumbents played a significant role in the school district's decision to select a 5-2 method of election. The information you have provided suggests that placing multiple incumbents in the same districts was unavoidable due to the location of their residences. The proposed plan provides as many as four incumbents with the opportunity to be re-elected. By contrast, the 7-0 plan would have limited the number of incumbents who could be re-elected to two. While protecting incumbency is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. See, e.g., Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S.Ct. 681 (1991); Ketchem v. Byrne, 740 F.2d 1398, 1408-9 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Where, as here, the protection afforded incumbents by selecting a method of election specifically designed to maintain incumbents is provided at the expense of minority voters, the school district bears a heavy burden of demonstrating that its choices are based on neutral, nonracial considerations and are not tainted, even in part, by an invidious racial purpose.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under Section 5 of the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the proposed change in the method of election for the school district.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the

objection is withdrawn or a judgment from the District of Columbia Court is obtained, the change in the method of election continues to be legally unenforceable. Clark v. Roemer, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.45.

With regard to the remaining changes, we understand that those changes are dependent on the now objected-to method of election change. Accordingly, no determination is appropriate with respect to those voting changes. See 28 C.F.R. 51.22(b).

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the action the Edna Independent School District plans to take concerning this matter. In that regard, I have asked the Voting Section to consider whether the at-large system violates Section 2 of the Voting Rights Act, should the school district determine to take no further action toward changing that system. If you have any questions, you should call Ms. Colleen Kane (202-514-6336), an attorney in the Voting Section.

Sincerely,

Stuart J. Ishimaru
Acting Assistant Attorney General
Civil Rights Division